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In the

Supreme Court of the United States

OCTOBER TERM, 1973

INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION, COMMUNICATIONS EQUIPMENT AND SYSTEMS DIVISION,

Petitioner,

vs.

LOCAL 134, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF RESPONDENT, LOCAL 134, IBEW

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638

INDEX

PAGE

Opinions Below 1

Jurisdiction 1

Statutes and Regulations Involved 2

Questions Presented 2

Statement of the Case 3

Summary of Argument 5

Argument 9

I. The clear statutory language of the Administrative Procedure Act §554 should be enforced as it is written 9

II. The jurisdictional dispute hearing of the Labor Board, which is held under section 10K of the LMRA, is an adjudication within the meaning of the APA 12

A. Sections 551, *Definitions*, and 554, *Adjudications*, encompass the §10K hearing of the Labor Board 12

B. This Court's Wyman-Gordon decision has rendered an even broader application of the APA's adjudication definition to Labor Board hearings 15

C. The decision of the Court of Appeals for the District of Columbia is erroneous because it is contrary to the Wyman-Gordon decision 17

D. The 10K Hearing is a determination that is required to be made on the record within the meaning of the APA's §554 18

PAGE

III. The determination that the 10K Hearing is an adjudication under the APA must be distinguished from the right to Judicial Review of the Labor Board's Decisions 23

A. Sources of the right to Judicial Review of administrative agency decisions 23

B. Labor Board rule concerning Judicial Review 27

C. Exhaustion of Administrative Remedy .. 28

IV. The Decision of the Seventh Circuit does not require the Labor Board to assign an Administrative Law Judge to 10K Hearings 32

V. The Board's argument that its views on the applicability of the APA are entitled to great weight is without merit 37

VI. The effect of the Seventh Circuit's Decision and its affirmance by this Court will result in no hardship to the Labor Board 39

VII. Conclusion 43

Appendix 1a

TABLE OF AUTHORITIES CITED

CASES:

Accardi v. Pennsylvania R.R., 383 U.S. 225 36

Bricklayers, Masons and Plasterers International Union of Amer. v. NLRB, 475 F.2d 1316 ....5, 17, 18, 36

CBS case (see NLRB v. Radio & Television Engineers, etc.)

Central Hardware Co. v. NLRB, 407 U.S. 539 36

Coca-Cola Co. v. FTC, 475 F.2d 299 .....25, 26

Excelsior Underwear Inc., 156 NLRB 1236 .....15, 16, 17

PAGE

Great Northern R.R. v. Sunburst Oil, 287 U.S. 358 16

Helvering v. City Bank Farmers' Trust Co., 296 U.S. 85 ..... 10, 11

Leedom v. Kyne, 358 U.S. 184 29

Leeds & Northrup Co. v. NLRB, 357 F.2d 527 30

Local 1976, United Brotherhood of Carpenters v. NLRB, 357 U.S. 93 11

Marcello v. Bonds, 349 U.S. 302 9

Marconi Wireless Telegraph v. Simon, 246 U.S. 46 37

McKart v. U. S., 395 U.S. 185 28

McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10 29

Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 28

NLRB v. Bell Aerospace, 94 Sup. Ct. 1757 13

NLRB v. Dayton Motels Inc., 474 F.2d 328 ..... 8, 42

NLRB v. Industrial Union of Marine & Shipworkers, 391 U.S. 418 29

NLRB v. Plasterers' Union, No. 79, 404 U.S. 116 14

NLRB v. Radio & Television Engineers Union, Local 1212, IBEW, 364 U.S. 573 ..... 6, 7, 19, 38

NLRB v. Wyman-Gordon Company, 394 U.S. 759 .... 5, 15, 17, 18, 19

Tunstall v. Brotherhood of Locomotive Firemen, 323 U.S. 210 36

U. S. v. Allegheny-Ludlum Steel Corp., 406 U.S. 742 33

U. S. v. American Trucking Associations, 310 U.S. 534 10

U. S. v. Florida East Coast R.R. Co., 93 Sup. Ct. 810 ..... 7, 19, 33, 36

PAGE

U. S. v. Riss, 341 U.S. 907 .....6, 23, 35

U. S. v. Southern Railway Company, 364 F.2d 86 24

Whitney National Bank v. Bank of New Orleans and P. R. Co., 379 U.S. 411 .....25, 26

Wong Yang Sung v. McGrath, 339 U.S. 33 .....
.....5, 6, 12, 20, 22, 23, 34, 35, 36

STATUTES AND REGULATIONS:

Administrative Procedure Act (5 U.S.C. 551, *et seq.*)

Section 551 .....6, 12, 13, 14, 15, 16, 17, 18, 23, 24
Section 551(6) 13, 16, 17
Section 551(7) 13, 16, 17
Section 553 15
Section 554 .....2, 5, 6, 7, 9, 11, 12, 13, 14, 18, 19, 20, 21, 22, 23, 32, 34, 35, 40
Section 556 .....2, 7, 32, 33, 34, 35, 36, 37
Section 557 .....2, 7, 10, 14, 32, 33, 34, 35
Section 701 24
Section 703 .....24, 26
Section 706 24

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*)

Section 8(b)(4)(D) 14, 19
Section 9 .....5, 9, 17, 18
Section 9(c) 16
Section 10(e) 26, 27
Section 10(f) 6, 26, 27, 30, 31
Section 10(k) 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 14, 17, 18, 19, 23, 24, 29, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41
Section 10(l) 3, 8, 39

PAGE

United States Supreme Court, Rules of Practice
Rule 40 §1(d)(2) 2

NLRB Statements of Procedures, Rules and Regulations (29 C.F.R. 101.1, *et seq.*)
29 C.F.R. 102.92 27

MISCELLANEOUS:

K. C. Davis, Administrative Law Treatise .....
.....6, 20, 21, 22, 23, 28

L. Jaffe, Judicial Control of Administrative Action .. 28

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BRIEF OF RESPONDENT, LOCAL 134, IBEW

OPINIONS BELOW

Local 134 accepts the statement of OPINIONS BELOW of the National Labor Relations Board (hereinafter Labor Board).

JURISDICTION

Local 134 accepts the statement of JURISDICTION of the Labor Board.

STATUTES AND REGULATIONS INVOLVED

Local 134 accepts the statement of the Labor Board, as to the Statutes and Regulations Involved.

QUESTIONS PRESENTED

The Petition for Writ of Certiorari listed as the Questions Presented the following:

1. Whether the Seventh Circuit properly decided that contrary to the National Labor Relations Board's established procedures, that agency must conduct jurisdictional dispute proceedings under §10(k) of the Labor Management Relations Act in accordance with the provisions of the Administrative Procedure Act applicable to adjudications (§554, §556 and §557).

2. Whether the subsequent prosecution of an unfair labor practice case by the same NLRB attorney who presided at the prior §10(k) hearing is an improper commingling of prosecutorial and adjudicative functions proscribed by §554 of the Administrative Procedure Act.

The Questions Presented section of the Brief by ITT and the Labor Board states these two issues substantially as set out in the Petition for Writ of Certiorari with grammatical changes to enhance their argument.[1]

A derivative question follows from the arguments of the Labor Board, ITT, and CWA, on the issue of whether a jurisdictional dispute being conducted under

[1] CWA attempts, improperly, to add a new question to those which are properly before this Court. Local 134 will not discuss that question, except to note that it is in violation of Rule 40 § 1(d)(2).

§10K is an adjudication within the meaning of the Administrative Procedure Act. That question may be stated as follows: Must the finding by the Seventh Circuit Court of Appeals that the 10K hearing is an adjudication within the meaning of the Administrative Procedure Act, necessarily result in the conclusion that the Labor Board's decision and determination of dispute is a final and appealable order under the review provisions of the APA or under the review provisions of the Labor Management Relations Act.

STATEMENT OF THE CASE

Local 134 accepts the Statement of the Labor Board with the following additions.

Subsequent to the filing of the unfair labor practice charge by ITT, the Labor Board, through its Chicago Office, filed a Petition for Injunction under Section 10(l) of the Labor Management Relations Act (hereinafter LMRA) on December 21, 1970, against Local 134. This action was designated as Case No. 70 C 3190 on the records of the United States District Court for the Northern District of Illinois, Eastern Division. No hearing was held on the Petition for Injunction, nor was an injunction issued by the Court. On January 20, 1971, by agreement of the Labor Board, ITT, CWA, and Local 134 the action was dismissed.

The Hearing Officer at the §10K hearing, quashed the subpoenas served by Local 134 on ITT and CWA, for the production of evidence concerning the execution of the collective bargaining agreement between them, covering the disputed work. The Labor Board relied, at least in part, upon that collective bargaining agreement for

its Determination of Dispute, in which it awarded the work to the CWA members employed by ITT.

In its Petition to set aside the Labor Board Order made to the Court of Appeals for the Seventh Circuit, Local 134 presented seven questions, including the refusal to consider the evidence sought by its subpoenas, as its Statement of Issues (Main A. 78 and 79). Since the Opinion of the Seventh Circuit concerned itself with only some of the issues presented by Local 134, other substantial questions including the question of the refusal to consider that evidence, remain undecided, because of the refusal to enforce the Board order based upon the violation of the Administrative Procedure Act.

Following the issuance of the decision by the Court of Appeals, the Labor Board closed the case file that gave rise to these proceedings. (See Appendix A)[1a]

[1a] The Appendix submitted by ITT, CWA, and Local 134 is cited as Main A, and the Supplemental Appendix of the Labor Board is cited as Supp. A.

SUMMARY OF ARGUMENT

The decision of the Seventh Circuit Court of Appeals should be enforced because it correctly applied the clear and unambiguous language of Section 554 of the Administrative Procedure Act. The prohibition against the commingling of functions, in the agency's adjudicatory and prosecutorial activities is seen from the language of the statute. Also, the Congressional intent is manifest from that language. This Court has so interpreted the language in the case of *Wong Yang Sung* v. *McGrath,* 339 US 33.

The jurisdictional dispute hearings, conducted under Section 10(k) of the Labor Management Relations Act, are an adjudication within the terms of the Administrative Procedure Act. The 10(k) hearing falls within the definition of adjudication as set out in Section 551 of the APA, because it is a part of the agency process for the formulation of an order.

This Court has decided in the *Wyman-Gordon* case, 349 US 759, that the APA's definition of adjudication applies even to the case of a Labor Board representation case hearing held under §9 of the LMRA. This decision renders nugatory the decision by the Court of Appeals for the District of Columbia in the *Bricklayers* case, 475 F2d 1316, which is relied upon for the proposition that the 10(k) hearing is not an adjudication. The basic rationale of the *Bricklayers* case was that the 10(k) hearing is not an adjudication under Section 554 because it is analogous to a Labor Board representation hearing. Since the 10(k) hearing is an adjudication under Section 551 of the APA, it must also qualify under Section 554 if it meets the other elements set out in that section.

This Court held in the *CBS* decision, *NLRB* v. *Radio and Television Broadcasting Engineers Union Local 1212*, that the language of Section 10(k) contains the idea of a hearing. Thus, this Court has held that the 10(k) hearing meets the requirement that the jurisdictional determination be made "on the record" within the meaning of Section 554, contrary to the Labor Board's contention. Further the conclusion of this Court is supported by the analysis of Professor Davis in his work titled Administrative Law Treatise. Professor Davis cites the *Wong* case supra and the *Riss* case 341 US 907, which were the precedent relied upon by the Seventh Circuit in its decision, in the instant case.

The error of ITT, CWA, and the Labor Board is based upon their failure to distinguish between the fact that the 10(k) hearing is an adjudication, within the ambit of the APA, and the right of judicial review set forth in the APA and the Labor Management Relations Act. Since the language of the LMRA does not specify the method by which judicial review may be held for the 10(k) hearing, the Labor Board is free to establish its own rules as to the method by which judicial review may be obtained. The Board has done so, by providing that the 10(k) hearing must become part of the unfair labor practice decision before it is a final order, and thus reviewable under Section 10(f) of the LMRA. This rule is in harmony with the judicial review provisions of the Administrative Procedure Act. Since a valid method for judicial review is established by the Labor Board for its 10(k) hearings, the principle of exhaustion of administrative remedies requires that the method prescribed by the Board be followed. Thus, Local 134's compliance with the Labor Board's method for judicial review is consistent with the

finding that the Section 10(k) hearing is an adjudication under the Administrative Procedure Act.

The finding that the 10(k) hearing is an adjudication does not necessarily result in the conclusion that the agency must assign an administrative law judge to hear those matters. The provisions of Section 554, prohibiting the commingling of functions, is capable of application without the necessity that the provisions of Section 556 and 557 of the APA be applied. This Court has held in the *Florida East Coast Railway* case 410 US 224 that the various protections of the Administrative Procedure Act are separable, and consequently need not all be applied to the agency conduct in a cumulative manner. Since the language of Section 554 is in the disjunctive, it can readily be applied without requiring the application of the provisions of Section 556 which require an administrative law judge to be utilized as the hearing officer. The decision of the Seventh Circuit is in harmony with this conclusion. Thus, an affirmance by this Court of the decision of the Seventh Circuit, would not necessarily result in the requirement that an administrative law judge be assigned to 10(k) hearings.

The Board's argument, that its interpretation of the applicability of the Administrative Procedure Act, to its Section 10(k) hearings is entitled to great weight, is without merit. The same argument was made to this Court in the *CBS* 364 U.S. 573 case, but was found to be without persuasive effect because of the Labor Board's failure to proceed as required by law.

The arguments advanced for the expeditious handling of jurisdictional disputes is not impeded by the finding of the Seventh Circuit. To the contrary, the application

of the injunctive relief under Section 10(l) of the LMRA have been applied to the instant case, prior to the 10(k) hearing and the subsequent unfair labor practice hearing. As a practical matter, the Labor Board will suffer no harm by following the decision of the Seventh Circuit, which prevents the assignment of the dual functions to the same employee. Such separation will serve to avoid the untenable situation, as in the instant case, where one individual serves as prosecutor in an unfair labor practice hearing, after having shaped the record, on which the Board made its jurisdictional dispute determination, by means of his previous rulings on admissibility of evidence. The rulings on evidence rather than being inconsequential, presented a substantial issue to the Seventh Circuit, concerning a conflict with a decision of the Sixth Circuit Court of Appeals, in the case of *NLRB* v. *Dayton Motels*, 474 F2d 328 on the question of consideration of relevant evidence.

ARGUMENT

I.

THE CLEAR STATUTORY LANGUAGE OF THE ADMINISTRATIVE PROCEDURE ACT §554 SHOULD BE ENFORCED AS IT IS WRITTEN.

A review of the Administrative Procedure Act in its pertinent sections, leads to the conclusion that the Seventh Circuit Court of Appeals was correct in its determination that the Labor Board violated the prohibition against the commingling of functions. Further, an analysis of the language of the various sections of the APA, here pertinent, must necessarily result in the conclusion that the hearing conducted by the Labor Board into the jurisdictional dispute under Section 10K of the statute is an adjudication within the meaning of the APA.

There is no doubt that the APA, in Section 554, titled *Adjudication*, prohibits the commingling of the prosecutorial and adjudicative functions in the same person. Section 554 begins in paragraph A with the following language:

> "(A) This section applies according to the provisions hereof in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing. . . ."

Paragraph (A) then goes on to list six exceptions to its applicability, which do not include the jurisdictional dispute hearing under Section 10K,[2] but which to include the Labor Board's certification of worker representatives,

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[2] This Court has long held that an exemption from the terms of the APA should not be presumed. *Marcello* v. *Bonds*, 349 US 302 at p. 310.

provided for in §9 of the LMRA. Specifically, in subsection (D) the language of Section 554 reads:

> "An *employee or agent engaged* in the performance of investigative or *prosecuting functions* for an agency in a case *may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review* pursuant to Section 557 of this Title, except as witness or counsel in public proceedings. . . .

Thereafter this paragraph lists specific named exceptions, which again do not include the 10K hearing.

In the construction of statutory language, this Court has applied the basic principle that clear language, which contains the Congressional meaning in direct terms should be interpreted accordingly. *United States* v. *American Trucking Associations,* 310 U.S. 534. On that point this Court said as follows:

> "* * * There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning.* * *" 310 U.S. 534 at 543 (citations omitted)

Earlier this Court said that the clear language of a statute resulted in an even more restrictive area of discretion in the Court. *Helvering* v. *City Bank Farmer's Trust Co.,* 296 U.S. 85. This Court said, concerning its need to look to the Congressional record as an aid for statutory construction, as follows:

> "* * * We are not at liberty to construe language so plain as to need no construction, or to refer to committee reports where there can be no doubt of the meaning of the words used. * * *" 296 US 85 at page 89 (footnote omitted).

Although the language of the *Helvering* case, supra., may have been somewhat modified by the passage of time, particularly in the area of interpretation and application of statutory language in the field of labor relations, the basic principle concerning clear statutory language has remained. The additional factor which this Court has looked to, is the ascertainment of the general purposes to which the Congress was seeking to address itself in the passage of the legislation. This was clearly stated by Mr. Justice Frankfurter in the case of *Local 1976, United Brotherhood of Carpenters* v. ***NLRB,*** 357 U.S. 93 as follows:

> "* * * The problem raised by these cases afford a striking illustration of the importance of the truism that it is the business of Congress to declare policy and not this Court's. The judicial function is confined to applying what Congress has enacted after ascertaining what it is that Congress has enacted. But such ascertainment, that is, construing legislation, is nothing like a mechanical endeavor. It could not be accomplished by the subtlest of modern 'brain' machines. Because of the infirmities of language and the limited scope of science in legislative drafting, inevitably there enters into the construction of statutes the play of judicial judgment within the limits of the relevant legislative materials. Most relevant of course is the very language in which Congress has expressed its policy and from which the Court must extract the meaning most appropriate. * * *" 357 U.S. 93 at 100.

This Court has long held that where the statute is clear and unambiguous in its language, it should be given the meaning that is explicit in the words used by Congress. Local 134 submits that the wording of Section 554 of the APA is an example of such clear language, which

requires only a direct application to prohibit any commingling of functions. This is what the Seventh Circuit did in its finding of such a violation by the Labor Board conduct in assigning the same attorney to the function of hearing officer in the 10(k) hearing and later as the counsel for General Counsel in the unfair labor practice hearing. That the clear language of § 554(d) speaks against the commingling of functions has not been seriously questioned since this Court so ruled in the case of *Wong Yang Sung* v. *McGrath*, 339 U.S. 33. In that case the meaning of the language was stated as follows:

> "More fundamental, however, was the purpose to curtail and change the practice of embodying in one person or agency the duties of prosecutor and judge. * * *" *Wong Yang Sung* v. *McGrath*, 339 U.S. 33 at page 41.

The Seventh Circuit applied the § 554 language in its holding that the Labor Board had violated this clear prohibition. (Main A. 68-70).

II.

THE JURISDICTIONAL DISPUTE HEARING OF THE LABOR BOARD, WHICH IS HELD UNDER SECTION 10K OF THE LMRA, IS AN ADJUDICATION WITHIN THE MEANING OF THE APA.

A. Sections 551, Definitions, and 554, Adjudications, encompass the §10K hearing of the Labor Board.

ITT, CWA, and the Labor Board apparently concede that § 554 does prohibit the commingling of functions where the administrative agency hearings are an adjudication within the meaning of the introductory language of that Section of the APA. They contend primarily, that the Labor Board's 10K hearing is not an adjudication within the meaning of that statute.

Thus the aplication of the prohibition contained in § 554, to the instant case, turns on whether the jurisdictional hearing in question is an adjudication. The APA in Section 551, titled *Definitions,* sets out the criteria for what constitutes an adjudication, in its subsection (7), which reads as follows:

> "Adjudication" means agency process for the formulation of an order."[2a]

It is undisputed that the jurisdictional dispute determination, issued by the Labor Board, becomes a part of its order issued following the unfair labor practice hearing. The Board's own rules and regulations in Section 102.9, provide that the record and exhibits at the 10K hearing become a part of the unfair labor practice hearing. This procedure was specifically recognized and followed at the unfair labor practice hearing in the instant case. (Main A. 77) Thus, the Labor Board's 10K hearing and the decision which eminates from that hearing, necessarily are part of that agency's process for the formulation of the Labor Board's subsequent unfair labor practice order.

As defined in the APA, Section 551(6): "order means the whole *or a part* of a final disposition, whether affirmative, negative, injunctive or declaratory in form, of an agency in a manner other than rule making but including licensing." [3] (emphasis added) The definition of order, therefore, includes either the entire final disposition or a part of the final disposition. Clearly the jurisdictional determination by the Labor Board is a part of its final

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[2a] This Court has recently noted, with approval, this language in the majority opinion in NLRB v. Bell Aerospace, 94 Sup. Ct. 1757 at p. 1770 fn 21.

[3] Cited with approval in NLRB v. Bell Aerospace, supra.

disposition which results in its unfair labor practice decision. The Labor Board's own Rules set out the procedure which requires the bifurcated hearing. Thus, as this Court noted in its decision of *NLRB* v. *Plasterers Local No. 79*, 404 U.S. 116, the 10K hearing is a necessary first step to the Labor Board's unfair labor practice hearing under Section 8(b)(4)(D). The Court said:

> "* * * When a section 8(b)(4)(D) charge is filed and there is reasonable cause to believe that an unfair labor practice has been committed, issuance of the complaint is withheld until the provisions of Section 10K have been satisfied. That section directs the Board to 'hear and determine' the dispute out of which the alleged unfair labor practice arose: the Board is required to decide which union or group of employees is entitled to the disputed work in accordance with the acceptable, Board-developed standards, unless the parties to the underlying suit settle the case or agree upon a method for settlement. Whether the Section 8(b)(4)(D) charge will be sustained or dismissed is thus dependent upon the outcome of the 10K proceeding. * * *" (404 U.S. 116 at pages 122 and 123)

Clearly the 10K hearing falls within the § 551(7) definitions of adjudication as being a necessary part of the agency process for the formulation of an order, because it is a part of the order which is the Labor Board's final disposition of the matter. It is submitted that the definitions of adjudication and order in § 551 of the APA, when read together, unnecessarily result in the conclusion that Section 554 of that Act is applicable to the jurisdictional dispute hearing under Section 10K.

B. This Court's Wyman-Gordon decision has rendered an even broader application of the APA's adjudication definition to Labor Board hearings.

This clear and unambiguous language of Section 551 has resulted in an absence of judicial interpretations of the meaning of its language. Obviously the Courts have had little difficulty in applying the literal terms of the definitions to the cases before them. However, there appears one decision, by this Court, which although not directly concerned with the interpretation of the APA, sets out the criteria for the type of Labor Board hearing which will be within the definition of adjudication. In *NLRB v. Wyman-Gordon Company*, 394 U.S. 759, this Court decided that the Labor Board could require an employer to submit the names and addresses of its employees who were eligible to vote in a representation election. The Labor Board had issued its decision requiring such action by the employer, in subsequent election cases, in its decision known as *Excelsior Underwear Inc.*, 156 NLRB 1236. This principal, which became known as Excelsior Rule was not promulgated in accordance with the requirements of Section 553 of the APA. This Court, through Mr. Justice Fortas decided that the Board had acted properly, even though it had not followed the rule-making requirements of the Act. The prevailing opinion by Mr. Justice Fortas, in which then Chief Justice Warren, Mr. Justice Stewart and Mr. Justice White joined, did not exhaustively analyze the question of adjudication.

However, in the specially concurring opinion by Mr. Justice Black, with whom Mr. Justice Brennen and Mr. Justice Marshall joined, a clear discussion of the meaning of adjudication under the provisions of Section 551 was

set forth.[4] After setting forth, by quotation, the definitions of adjudication and order, contained in # 6 and 7 of Section 551, and noting the distinction between rule making and adjudication, Mr. Justice Black said as follows:

> "In the present case there is no dispute that all the procedural safeguards required for 'adjudication' were fully satisfied in connection with the Board's *Excelsior* decision, and it seems plain to me that that decision did constitute 'adjudication' within the meaning of the Administrative Procedure Act, even though the requirement was to be prospectively applied. See Great Northern R. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358, 53 S.Ct. 145, 77 L.Ed. 360 (1932). The Board did not abstractly decide out of the blue to announce a brand new rule of law to govern labor activities in the future, but rather established the procedure as a direct consequence of the proper exercise of its adjudicatory powers. Sections 9(c) (1) and (2) of the Labor Relations Act empower the Board to conduct investigations, hold hearings, and supervise elections to determine the exclusive bargaining representative that the employees wish to represent them. This is a key provision of the plan Congress adopted to settle labor quarrels that might interrupt the free flow of commerce. A controversy arose between the Excelsior Company and its employees as to the bargaining agent the employees desired to act for them. The Board's power to provide the procedures for the election was invoked, an election was held, and the losing unions sought to have that election set aside. *Undoubtedly the Board proceeding for determination of whether to confirm or set aside that election was 'agency process for the formulation of an order'* and thus *was 'adjudication' within the meaning of the Administrative Procedure Act.*

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[4] The dissents by Mr. Justice Douglas and Mr. Justice Harlan did not not disagree with the analysis and conclusions of Mr. Justice Black.

> "The prevailing opinion seems to hold that the *Excelsior* requirement cannot be considered the result of adjudication because the Board did not apply it to the parties in the *Excelsior* case itself, but rather announced that it would be applied only to elections called 30 days after the date of the *Excelsior* decision. But the *Excelsior order was nonetheless an inseparable part of the adjudicatory process.*" (emphasis supplied) (394 U.S. 759 pages 172 and 173).

Thus, even in the case of a representation hearing, under Section 9 of the LMRA, which is specifically exempted from the coverage of §554, Mr. Justice Black found that the Board proceedings met the requirements of Section 551 (6) and (7), because it was part of the agency's process for the formulation of an order. Therefore, the 10K hearing must be considered as an adjudication within the general definition set forth in APA §551.

C. The decision of the Court of Appeals for the District of Columbia is erroneous because it is contrary to the Wyman-Gordon decision.

The arguments advanced by ITT, CWA and the Labor Board for the proposition that the Section 10(k) hearing is not an adjudication, rely primarily on the authority of a decision by the Court of Appeals for the District of Columbia known as *Bricklayers, Masons, and Plasterers International Union of America* v. *NLRB*, 475 F. 2d 1316. However that decision cannot serve as valid authority for such a proposition because it is directly contrary to the finding of this Court in the *Wyman-Gordon* case, Supra. The rationale of the Court of Appeals, for its conclusion that the Section 10(k) hearing is not an adjudication, rests basically on the Court's analogizing the 10(k) hearing to the representation case hearings held under Section 9 of the Labor Management Relations Act. Initially, it

should be noted that the analogy has as a fatal defect the fact that the Section 10(k) hearings are authorized by Section 10 of the LMRA, while the representation hearings are authorized by Section 9 of that statute.

But even if the analogy were to be considered as valid, the language of Mr. Justice Black, quoted above, shows that this Court has found representation hearings themselves, to be within the definition of adjudication as set out in Section 551 of the APA. Therefore the conclusion by the Court of Appeals for the District of Columbia in the *Bricklayers* case, supra, is obviously contrary to the decision of this Court in *Wyman—Gordon,* and cannot serve as valid authority to overturn the Seventh Circuit decision in the instant case.

D. The 10K Hearing is a determination that is required to be made on the record within the meaning of the APA's §554.

The Labor Board presents the untenable argument in its Brief, Section I B, that the 10(k) hearing is not a determination which is required by statute to be made on the record after opportunity for an agency hearing. Such a contention is exactly contrary to the clear wording of Section 10(k) of the LMRA and this Court's statement as to the meaning of that language.

The use of the term adjudication in §554(a) is grammatically part of the introductory sentence which states as follows: "* * * in every case of adjudication required by statute to be determined on the record after opportunity for agency hearing * * *." The provisions of Section 10K of the LMRA specifically requires that the hearing be held on the jurisdictional dispute question. Thus Section 10K of the statutes reads as follows:

> "Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of Section 8(b), the Board is *empowered and directed to hear and determine* the dispute out of which such unfair labor practice shall have arisen, ..." (emphasis supplied)

Therefore Congress has specifically required by statute, that the matter be determined on the record for all of those cases concerning a jurisdictional dispute. Again a literal application of the language of the LMRA is sufficient to meet the requirement of adjudication, under §554 of the APA.

This Court commented specifically upon the meaning of the language of Section 10(k) in its landmark decision of *NLRB* v. *Radio and Television Broadcast Engineers Union Local 1212 IBEW*, 364 U.S. 573. In this regard the Court stated what the language of Section 10(k) meant as follows:

> "The language of §10(k) supplementing §8(b)(4)(D) as it does, sets up a method adopted by Congress to try to get jurisdictional disputes settled. The words 'hear and determine the dispute' convey not only the *idea of a hearing* but also the idea of deciding a controversy. * * *" 364 U.S. 573, 579 (emphasis added)

The Labor Board error is based on its failure to distinguish between the adjudicatory process of its 10(k) hearing and the rule making process of administrative agencies, as exemplified by the ICC's freight car procedure, which was the subject of this Court's decision in the case of *U. S.* v. *Florida East Coast Railway Company*, 410 U.S. 224.

Local 134 submits that this Court's clear language cited above is a clear and unequivocal interpretation of the words of §10(k) which do require that the determination be made on the record.

Further, in his exhaustive and authoritative work, titled Administrative Law Treatise, Professor K. C. Davis specifically discussed this question as follows:

> "§ 13.08. Adjudications "Required by Statute to Be Determined on the Record after Opportunity for Agency Hearing"
>
> All of Section 5 is limited to adjudications 'required by statute to be determined on the record after opportunity for an agency hearing.' This limitation has been especially troublesome.
>
> One difficulty lies in finding what is 'required by statute.' If a statute is silent with respect to hearings and if a court holds that Congress must have intended that a hearing be held, does the statute require a hearing? If so, what if the statute is silent concerning hearings and the court instead of creating law in the name of statutory interpretation creates law in the name of the Constitution and holds that a hearing is required? Does the statute then require a hearing? If not, should the application of Section 5 depend upon the form of words the court, without this problem in mind, happened to use in writing its opinion?
>
> Similarly, if a statute requires a hearing but says nothing about requiring the determination to be made on the record, a court may interpret the requirement of a hearing as a requirement of the kind of hearing that includes a determination on the record; if this interpretation is given, does the statute require a determination on the record? If so, should the opposite answer be given when the court says nothing about statutory interpretation but holds that due process requires the determination to be made on the record?" (at pages 223 and 224)

* * *

After citing some examples, Davis, cites this Court's decision in the case of *Wong Yang Sung* v. *McGrath*, 339 U.S.

33, as being dispositive of the question. He said as follows:

> "The basic problem came to the Supreme Court in Wong Yang Sung v. McGrath. An alien ordered deported sought habeas corpus on the ground that Section 5(c) of the APA had been violated by the Immigration Service, and the question was whether a deportation proceeding is 'required by statute to be determined on the record after opportunity for an agency hearing,' within the meaning of the introductory clause of Section 5. The Immigration Act provided merely that 'any alien . . . found in the United States in violation of this Act . . . shall, upon the warrant of the Attorney General, be taken into custody and deported.' The Act said nothing either of hearing or of determination on the record. The Government argued that Section 5 of the APA in the original bill applied to hearings required 'by law,' that the Attorney General had suggested that it be changed to 'required by statute or Constitution,' that it finally emerged 'required by statute,' and that therefore the provision should apply only when explicit statutory words confer the right to hearing and to a determination on the record. But the Court dismissed the arguments of both parties resting on legislative history, with the remark: 'The legislative history is more conflicting than the text is ambiguous.'
>
> "The Court was interested, not in the relative superficialities of legislative history, and not in a mere analysis of the words that the draftsmen had happened to use in trying to express the will of Congress, but in the fundamental objectives of the legislation and in producing a result that would best achieve those objectives. For this reason the Court surveyed the whole history of the development of the APA, beginning in 1929 with the introduction by Senator Norris of a bill to create a separate administrative court. The Court spoke of efforts to improve state administra-

tive practices, of the 1937 Committee on Administrative Management, of the Attorney General's Committee on Administrative Procedure, of the Walter-Logan bill and the President's veto message, and finally of the evolution of the McCarran-Sumners bill which became the APA. From this survey the Court concluded that 'it would be a disservice to our form of government and to the administrative process itself if the courts should fail, so far as the terms of the Act warrant, to give effect to its remedial purposes where the evils it was aimed at appear.'

"The Court then emphasized that the two principal purposes of the APA were to introduce greater uniformity of procedure and 'to curtail and change the practice of embodying in one person or agency the duties of prosecutor and judge.' This statement the Court fully supported with its historical survey of the movement that became the APA. It concluded that the Court's plain duty was 'to construe this remedial legislation to eliminate so far as its text permits the practices it condemns.'" (at pages 227 and 228.) (footnotes omitted)

Finally, Davis shows that the *Wong* case rationale has been applied by this Court in subsequent cases, by the following language.

"That the Court meant what it said in the Wong case is shown by the Riss case of the following year. The ICC denied a certificate of convenience and necessity to a motor carrier, without complying with § 5 of the APA. The district court held that the statute authorizing certificates did not require a hearing. Much to the consternation of the ICC bar, the Supreme Court reversed per curiam, with a mere citation of the Wong case. When the Seventh Circuit held that § 5 did not apply to a fraud order proceeding in the Post Office Department, the Solicitor General confessed error and the Supreme Court reversed per curiam. Another court has later applied § 5 to a Post Office

> order stopping delivery of mail on grounds of obscenity." (footnotes omitted) at page 229.

The decisions cited by Professor Davis, including the *Wong* case supra and the *Riss* case, supra are the exact precedent relied upon by the Court of Appeals for the Seventh Circuit as the foundation for its decision (Main A. 68). It is clear that the 10K hearing meets the requirement of adjudication under the APA, whether the question be viewed from the definition as contained in §551 or the specific reference to §554(a). Thus, since the 10K hearing meets the criteria of an adjudication, the Seventh Circuit's conclusion that the APA was violated, must necessarily follow. It is submitted by Local 134, that the Court below was correct when it concluded as follows:

> "* * * This commingling of functions is plainly inconsistent with both the spirit and the letter of the Act, and, we think, incompatible with the accepted norms for the proper administration of justice. An order of the Board thus tainted should not be enforced." (Main A. 71)

III.

THE DETERMINATION THAT THE 10K HEARING IS AN ADJUDICATION UNDER THE APA MUST BE DISTINGUISHED FROM THE RIGHT TO JUDICIAL REVIEW OF THE LABOR BOARD'S DECISION.

A. Sources of the right to Judicial Review of administrative agency decisions

Additional reasons advanced by ITT, CWA and the Labor Board for the reversal of the decision by the Seventh Circuit, are the alleged practical problems which would arise from the affirmance of that decision. They argue that the 7th Circuit's decision, which holds that the 10K hearing is an adjudication under the APA, would

necessarily result in the conclusion that the 10K decision is an appealable order subject to immediate review by the Court of Appeals. This conclusion, which is unsubstantiated by any citation of authority, is erroneous and results from a failure to analyze the judicial review provisions of both the APA and the LMRA.

As was noted in Section II of the argument set out above, the provisions governing administrative agencies in the handling of their immediate functions, is set forth in 5 U.S.C. 551 through 559. However, that statute also contains the provisions for judicial review of administrative agencies actions in 5 U.S.C. §701 through 706. These provisions for judicial review are general in nature, and by their terms are not applicable to those instances where Congress has specifically set out a specific judicial review provision. Thus in Section 703, titled Form and Venue of Proceedings, the APA reads as follows:

> "The form of proceeding for judicial review is the special statutory review proceedings relevant to the subject matter *in a court specified by statute.* * * *"

Again we have clear and unequivocal language which states that it is the intent of Congress that the appeal route to be followed, is that contained in the statute creating the administrative agency. This principle has been followed by the Fifth Circuit Court of Appeals in the case of *United States* v. *Southern Railway Company*, 364 F. 2d 86. There the Court said as follows:

> "* * * A long line of Supreme Court cases establishes the principle that where Congress has provided administrative and judicial review procedures which are designed to permit agency expertise to be brought to bear upon particular problems, the prescribed pro-

> cedures are exclusive, and this is true even though Congress may not have expressly provided for the exclusiveness of the statutory procedure. Whitney Bank v. New Orleans Bank, 379 U.S. 411, 85 S.Ct. 551, 13 L.Ed.2d 386 (1965). * * *" 364 F.2d 86 at p. 91.

The language of this Court in the case cited in the Fifth Circuit decision is as follows:

> "* * * That Congress has not expressly provided that the statutory procedure is to be exclusive does not require a different conclusion. For Congress has expressly rejected proposed provisions for review in these cases in the district courts. Moreover it has enacted a specific statutory scheme for obtaining review, and where Congress has directed such a procedure as that found in the Bank Holding Company Act of 1956, the doctrine of exhaustion of administrative remedies comes into play and requires that the statutory mode of review be adhered to notwithstanding the absence of an express statutory command of exclusiveness. * * *" Whitney National Bank v. Bank of New Orleans and P.R. Co., 379 U.S. 411 at page 422.

Finally the Fifth Circuit has reaffirmed the principle set out above in the *Southern Railway* and *Whitney* cases in a more recent decision in the case of *Coca-Cola Company* v. *F.T.C.*, 475 F. 2d 299. In that case the Circuit Court quoted from this Court's *Whitney* decision as follows:

> "* * * The Federal Trade Commission Act, 15 U.S.C. § 41 et seq., contemplates judicial review only of 'an order of the Commission to cease and desist,' 15 U.S.C. § 45 (c), and then only 'in the court of appeals of the United States.' *Id.* This scheme is fully consonant with the Administrative Procedure Act, 5 U.S.C. § 551 et seq. The Supreme Court has said, moreover, that where Congress 'has enacted a specific statutory

> scheme for obtaining review, . . . the doctrine of exhaustion of administrative remedies . . . requires that the statutory mode of review be adhered to notwithstanding the absence of an express statutory command of exclusiveness.' Whitney Nat'l Bank v. Bank of New Orleans 379 U.S. 411, 422, 85 S.Ct. 551, 558, 13 L.Ed.2d 386 (1965). * * *" Coca-Cola Company v. F.T.C., 475 F.2d 299 at 302.

The above cases make it clear that the principle set forth in Section 703 of the APA should be followed where the statute, such as the LMRA has specifically set forth the method by which judicial review may be obtained.

It is undisputed that the LMRA has specifically contained therein the congressionally intended method by which review can be obtained. In Section 10 of that Act, 29 U.S.C. §160, there is provided, in two separate sections, methods of judicial review. Initially under subsection (e) the Board is given the right to seek enforcement of its orders in the United States Court of Appeals. That Section says as follows:

> "* * * (e) The Board shall have power to petition any Court of Appeals of the United States . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, * * *"

In addition §10(f) of that statute sets forth an equivalent right to review in parties who have been aggrieved by a Board order. The language of that subsection is as follows:

> "(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in

> any United States Court of Appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business. * * *"

The provisions of subsection (f) specifically use the term "final order of the Board", as the prerequisite for any aggrieved party to seek judicial review. Therefore the question of what constitutes the final order of the Board is the determinant of when judicial review is available to a party who has appeared before that administrative agency.

B. Labor Board rule concerning Judicial Review

Since Section 10(f) of the LMRA does not specifically set forth the meaning or difinition of final order, the Congressional intent has been that the Labor Board should be free to ascertain for itself when the 10K hearing is subject to judicial review.[5] The Labor Board has done this in its Rules and Regulations under Section 102.92 where the Board said as follows:

> "Section 102.92 Review of Determination—The record of the proceedings under Section 10(k) and the determination of the Board thereon shall become a part of the record in such unfair labor practice proceedings and shall be subject to judicial review, insofar as it is in issue, in proceedings to enforce or review the final order of the Board under Section 10(e) and (f) of the Act."

Thus the Labor Board has prescribed by its own internal rules, the method by which the jurisdictional dispute under Section 10(k) may become a part of the combined final order which is subject to review under 10(e) and (f).

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[5] The LMRA provides that the Labor Board should fashion its own rules in comformity with the provisions of the APA. (see 29 USC § 156)

It is clear that this prescribed method for review must be followed by any party appearing before the Board, such as Local 134, under the principle of exhaustion of administrative remedy. This Court has clearly required the exhaustion of administrative procedural requirements under the general theory of the exhaustion of administrative remedies.

C. Exhaustion of Administrative Remedy

In discussing that doctrine in the case of *McKart* v. *United States*, 395 U.S. 185, this Court said, through Mr. Justice Marshall, as follows:

* * *

"The doctrine of exhaustion of administrative remedies is well established in the jurisprudence of administrative law. See generally 3 K. Davis, Administrative Law Treatise § 20.01 *et seq.* (1958 ed., 1965 Supp.); L. Jaffe, Judical Control of Administrative Action 424-458 (1965). The doctrine provides 'that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.' Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51, 58 S.Ct. 459, 463, 82 L.Ed. 638 (1938).

* * *

"Perhaps the most common application of the exhaustion doctrine is in cases where the relevant statute provides that certain administrative procedures shall be exclusive. See Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 58 S.Ct. 459, 82 L.Ed. 638 (1938) (National Labor Relations Act). The reasons for making such procedures exclusive, and for the judicial application of the exhaustion doctrine in cases where the statutory requirement of exclusivity is not so explicit, are not difficult to understand. A primary purpose is, of course, the avoidance of premature interruption of the administrative process." 395 U.S. 185 at 193

This Court has applied the principle of exhaustion of administrative remedies to matters before the Labor Board in cases more recent than *Myers* v. *Bethlehem Shipbuilding*, See *NLRB* v. *Industrial Union of Marine and Shipworkers*, 391 U.S. 418 at page 426.

Those cases where this Court has seen fit to grant judicial review contrary to the rules prescribed by the Labor Board has been in cases where the Board has specifically violated a prohibition of the Act, or exceeded the authority which Congress has granted it. Thus, in *Leedom* v. *Kyne*, 358 U.S. 184, an exception was granted to the exhaustion of administrative remedies principle. In explaining the limited area of this exception, this Court later stated in *McCulloch* v. *Sociedad National de Marineros de Honduras*, 372 U.S., 10 as follows:

> "* * * Having examined the question of whether the District Court had jurisdiction at the instance of Sociedad to enjoin the Board's order, we hold that the action filed in the limited exception fashioned in *Leedom* v. *Kyne*, 358 U.S. 184, 79 S. Ct. 180, 3 L.Ed. 2d 210 (1958). In that case judicial intervention was permitted since the Board's order was 'in excess of its delegated powers and contrary to a specific prohibition of the act.'" 372 U.S. 10 at page 16

Clearly the Labor Board's having set forth in its rules the fact that the 10(k) hearing would become a part of, and be absorbed into, the unfair labor practice hearing, was not in excess of its delegated powers, nor was it contrary to the specific prohibition of the Act and thus is outside the *Leedom* v. *Kyne* exception. Since this internal rule of Labor Board procedure which proscribes the route to judicial review, is not clearly contrary to Congressional intent, it must be followed.

The Third Circuit Court of Appeals had occasion to pass upon the relationship between the judicial review provisions of the APA and those of the LMRA. *Leeds and Northrup Company* v. *NLRB*, 357 F. 2d 527. Therein, speaking upon the availability of judicial review under Section 10(f) of the statute that Court said as follows:

* * *

"On the record before us we must disagree with the contentions of respondent. Jurisdiction of this petition obtains under Section 10(f) of the National Labor Relations Act, as amended (49 Stat. 449 29 U.S.C. 160(f), and Section 10(e) of the Administrative Procedure Act (60 Stat. 237, 5 U.S.C. 1009 (e)).

* * *

To propose that United States Courts of Appeal are powerless, in a jurisdictional sense, to review quasi-judicial administrative action, *either because rules* and *regulations* or *policy, do not provide* an *adequate avenue of review* up to the door of the court, or because of the absence of precise Congressional articulation for such review, poses inadequacy and injustice which Congress would never intend. It is *in such circumstances* that the *Administrative Procedure Act, 5 U.S.C. 1001, et seq., 1009, makes its greatest contribution.* The complex of administrative government designed by Congress was intended to promote expertise in particular areas of extensive activity, as well as unburden the judiciary. However, such design and intention does not confer upon a governmental agency the power to foreclose judicial review. To hold otherwise would do violence to fundamental constitutional concepts of government and sow the seeds of oligarchy in the administrative level of government, thus placing it beyond the reach of the judiciary as a reviewing authority, where contemplated by statutory design, as here. * * *" 357 F.2d 527 at pp. 531 and 532 (footnote omitted)

Thus, the Third Circuit has held that the review provisions of the APA are intended to apply only when there is no adequate method of judicial review provided by Congress in the statute, or by the agency in its internal rules. Local 134 submits that this analysis by the Third Circuit correctly states the relationship between the judicial review provisions of the APA and the LRMA. Further it is implicit in the language of that Court that the congressional intent, as seen by the relationship between these two statutes, is that the Labor Board has been granted the authority to prescribe its own internal rules as to the appropriate time for judicial review by the designation of what is a final order, or by some other final conduct which makes judicial review appropriate. In the area of the 10(k) jurisdictional dispute hearing, the Board, by its own rules has adopted its internal procedure, whereby the 10(k) hearing is absorbed into the unfair labor practice decision. That combination of jurisdictional dispute determination and unfair labor practice decision comprises the final order which is reviewable under Section 10(f) of the LMRA.

Local 134 has followed the Labor Board rules in the instant case and petitioned for review, by the Seventh Circuit only after the combined 10(k) hearing determination and unfair labor practice decision's was issued as the final order. Thus Local 134 has exhausted the administrative remedies set out by the Labor Board, in harmony with the provisions of the APA, for the judicial review of its final order.

More importantly to the instant case, the argument advanced, that any finding by this Court to the effect that the 10(k) jurisdictional determination is an adjudication under the APA, would necessarily make available the right

of independent judicial review, is an erroneous argument. Local 134 submits that the argument based upon the alleged basis of interference with agency process by premature judicial review, is improper and should be disregarded by this Court.

IV.

THE DECISION OF THE SEVENTH CIRCUIT DOES NOT REQUIRE THE LABOR BOARD TO ASSIGN AN ADMINISTRATIVE LAW JUDGE TO 10K HEARINGS.

ITT, CWA and the Labor Board contend that the decision of the Seventh Circuit will have a detrimental effect on future Labor Board jurisdictional dispute hearings because it will require the Labor Board to assign an Administrative Law Judge to the hearings held under Section 10K. This contention is erroneous because, as noted above in III of the argument, the determination that a 10K hearing is an adjudication within the meaning of the introductory language of §554 of the APA, does not necessarily mean that it is a final order of the Labor Board.

Further, the language in the second paragraph of § 554(d), is such that it does not require the Labor Board to assign an Administrative Law Judge to hearings under Section 10K. That language, which prohibits the commingling of functions, is phrased in the disjunctive when it speaks of the type of agency conduct to which the prohibition applies. Thus in pertinent part the language reads:

> "* * * may not, in that or a factually related case, participate or advise in the *decision*, recommended decision, *or* agency review pursuant to Section 557 of this Title * * *" (emphasis supplied).

This clear statutory language, which uses the word "or," in front of the words "agency review pursuant to Section 557," differentiates that type of agency conduct from the type of conduct which results in a decision. Thus, while the prohibition applies to the 10K hearing, which results in a Decision and Determination of Dispute, that decision need not bring into play the second part of the disjunctive, which pertains to agency review pursuant to Section 557. If Section 557 were to necessarily be applied to the 10k hearing, then the Labor Board could be required to assign an Administrative Law Judge to hear that matter.

Subsection (c) and the first paragraph in (d) of § 554, specifically refer to Section 556 and 557 in interrelationship to the type of decisions involved. However, the second paragraph of (d) which includes the prohibition against commingling, does not refer to Section 556 and refers only to agency process under Section 557 in the disjunctive. Thus, the 10K hearing, which is required to be held under the provisions of § 554, need not he held under the additional requirements of § 556 and 557 of the APA.

This Court has had occasion to pass upon the question of whether these various sections of the APA need be applied as an interrelated single entity or whether, to the contrary, one section may stand on its own. *United States* v. *Florida East Coast Railway Company*, 410 U.S. 224, 83 S.Ct. 810. That case concerned the rule-making provisions of Section 553 of the APA and the relationship to Sections 556 and 557. This Court speaking through Mr. Justice Rehnquist stated as follows:

> " * * *
>
> Following our decision last Term in United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742, 92

S.Ct. 1941, 32 L.Ed.2d 453 (1972), we noted probable jurisdiction, 407 U.S. 908, 92 S.Ct. 2431, 32 L.Ed.2d 682 (1972), and requested the parties to brief the question of whether the Commission's proceeding was governed by 5 U.S.C. § 553 or by 556 and 557 of the Administrative Procedure Act. *We here decide that the Commission's proceeding was governed only by §553 of that Act*, and that appellees received the 'hearing' required by § 1(14)(a) of the Interstate Commerce Act. We therefore reverse the judgment of the District Court and remand the case to that court for further consideration of appellees' other contentions that were raised there but which we do not decide.

* * *

U.S. v. Florida East Coast R.R. Co., 93 Sup. Ct. 810 at pages 812, 813, and 814. (emphasis supplied and footnotes omitted)

It is submitted by Local 134 that the rationale expressed above, for the separation of Section 553 from the unnecessary application of Section 556 and 557, applies equally to the ability of Section 554 to stand on its own. If anything, Section 554 is able to stand on its own more effectively than Section 553, because of the use of the disjunctive in the relevant parts of Section (b). In addition, it is significant that the adjudications covered by § 554 may be either the whole or a part of the agency's final order. (See Part II of Argument supra)

The Labor Board by its rules has chosen to establish the 10(k) hearing as constituting only a part of its two step decision procedure which results in the agency's final order. Clearly the provisions of Section 556 and 557 of the APA are applicable to the subsequent unfair labor practice hearing, and thus the parties are afforded the protection of those sections of that statute.

Given the distinction made by this Court as to the separability of the clauses of the APA, the question arises as to whether that distinction was made by the Seventh Circuit or whether it can be made by this Court in light of the Seventh Circuit's decision. Local 134 submits that this Court may make such a distinction without negating the essential rationale of the Seventh Circuit. That Court's decision is based upon the violation of Section 554 as interpreted by the *Wong* case and the *Riss* case, supra. (Main A. 68) The Seventh Circuit found that the essence of the violation by the Labor Board was the ability of the hearing officer at the 10(k) hearing to shape the record which the Board subsequently relied upon to make its decision. This factor, coupled with the psychological problems presented by the possibility of serving as the advocate in the subsequent hearing, were the elements which the Seventh Circuit found to violate the separation of functions prohibition as set out in the *Wong* case.[6] The decision of the Seventh Circuit which was in favor of removing the potential for such psychological dilemmas by the application of the safeguards of the *Wong* decision is both psychologically and judicially sound. Given the choice between the two alternate speculations on the mental machinations of the Labor Board's employee, that Court chose to decide in favor of that course which would protect the rights guaranteed in §

[6] It is argued that the psychological factor did not exist because the individual could not know, when he was the hearing officer, that he would be assigned as the prosecutor in the subsequent case. It is submitted by Local 134 that the contention that the individual did not at least speculate on this possibility, presents a psychological assumption that is not only unwarranted but also contrary to human nature. He may also have been aware that his employment by Illinois Bell Telephone Company was to begin shortly thereafter.

554 of the APA. However this finding does not turn upon the question of whether the hearing officer must be an administrative law judge pursuant to the requirements of Sections 554 and 557.

Although Local 134 did present as one of its arguments to the Seventh Circuit, the failure by the Labor Board to assign an administrative law judge to the 10K hearing, that Court did not directly decide this question. The Court did refer to the provisions of Section 556, to illustrate the congressional intent that the administrative officers who presides at such hearing be completely isolated, impartial and independent. (Main A. 70) However the reference to the conditions that relate to administrative law judges, did not result in that Court's finding that an Administrative Law Judge must necessarily hear all 10K matters. Rather, that Court assumed in its decision that the protections of Section 556 were afforded in the instant case. (Main A. 70, fn. 3) Significantly the Seventh Circuit did not refer to the *Bricklayers* case and did not thereby render a decision which presents a direct conflict with the Court of Appeals for the District of Columbia. Therefore an affirmation by this Court, of the Seventh Circuit decision which is based primarily upon the rationale of the *Wong* case, does not require that the distinction of the *Florida East Coast Railway* case be inoperative.

This Court has long held that, when a case has been decided by the Court of Appeals based on an erroneous view of the law, then the case will be remanded to the Court of Appeals for consideration of issues raised before it, but not decided by its initial decision. *U.S.* v. *Florida East Coast RR*, supra; *Central Hardware Co.* v. *NLRB*, 407 U.S. 539; *Accardi* v. *Pennsylvania Railroad*, 383 U.S. 225; *Tunstall* v. *Brotherhood of Locomotive*

Firemen, 323 U.S. 210; and *Marconi Wireless Telegraph* v. *Simon*, 246 U.S. 46. The primary reason that this Court has remanded for consideration by a Court of Appeals, is to obtain the benefit of the views of the Court of Appeals, after argument by the parties. The absence by the Court of Appeals of a ruling upon an issue that was argued before it, has the effect of removing that issue from the scope of the decision of this Court. Conversely where this Court affirms the decision of the Court of Appeals, based upon one argument presented to it, then other arguments not decided by the Court of Appeals are outside the application of an affirmation of this Court.

Thus, should this Court affirm the decision of the Seventh Circuit, the issue of an administrative law judge necessarily being required to hear the 10(k) hearings is not encompassed within this Court's order. Whether there would be a conflict between the Seventh Circuit and the Court of Appeals for the District of Columbia, will necessarily have to wait for another case. Therefore, the decision of this Court will not, in and of itself, necessarily require that the Labor Board begin assigning administrative law judges to hear the 10(k) hearings. The argument to that effect should be rejected by this Court.

V.

THE BOARD'S ARGUMENT THAT ITS VIEWS ON THE APPLICABILITY OF THE APA ARE ENTITLED TO GREAT WEIGHT IS WITHOUT MERIT.

The Board argues in Section I, D. of its Brief that its interpretation of the applicability of the APA, particularly §554, to its 10(k) proceedings, is entitled to great weight since its procedure was adopted in 1949. While it is true that, in general, the Court will give serious consideration to the decisions of an administrative agency on

the method by which it perform this function, the Labor Board has had a noticeably poor history insofar as interpreting Section 10(k) is concerned. The Labor Board had, for many years after the enactment of §10(k), declined to make an award designating which of the two competing unions was entitled to perform the disputed work. When this practice came before this Court, the Labor Board made the same argument in that case as it does here, to the effect that its interpretation of Section 10(k), and its procedures under that section, should be given great weight. That contention was rejected by this Court when it said, speaking through Mr. Justice Black, as follows:

> "The Board's final contention is that since its construction of §10(k) was adopted shortly after the section was added to the Act and has been consistently adhered to since, that construction has itself become a part of the statute by reason of Congressional acquiescence. In support of this contention, the Board points out that Congress has long been aware of its construction and yet does not see fit to adopt proposed amendments which would have changed it. In the ordinary case, this argument might have some weight. • • • •
>
> "We conclude that the Board's interpretation of its duty under Section 10(k) is wrong and that under that section it is the Board's responsibility and duty to decide which of two or more employee groups claiming the right to perform certain work tasks is right and then specifically to award such tasks in accordance with its decision. Having failed to meet that responsibility in this case, the Board could not properly proceed under Section 10(c) to adjudicate the unfair labor practice charge. The Court of Appeals was therefore correct in refusing to enforce the order which resulted from that proceeding." *NLRB* v. *Radio, Television Engineers Union Local 1212, I.B.E.W.*, 364 U.S. 573 at 585, 586.

This Court's rejection of the Board's argument as to its expertise in interpreting the statute which it is charged to enforce, is clear precedent to reject the Board's argument in the instant case, particularly since the Board asks this Court to accept its interpretation of not only Section 10(k) but of the provisions of the APA.[7]

Local 134 submits that this Court should reject out-of-hand the argument by the Labor Board, that its interpretation of the APA should be accepted by this Court. It is beyond question that the administrative agency's interpretation of the applicability of the APA to its own procedures is particularly inappropriate.

VI.

THE EFFECT OF THE SEVENTH CIRCUIT'S DECISION AND ITS AFFIRMANCE BY THIS COURT WILL RESULT IN NO HARDSHIP TO THE LABOR BOARD.

ITT, CWA, and the Labor Board have argued various alleged detrimental, practical effects of the Seventh Circuit decision. One such argument is the Congressional intent of expeditious handling of strikes involved in jurisdictional dispute matters. The statutory scheme, as conceded by ITT, CWA, and the Labor Board, is to resolve the strike or threatened strike by means of injunction from the Federal District Court pursuant to §10(l) of

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[7] The question of Congressional acquiescence as mentioned in the CBS case works against the Board's theory in that the Labor Board's procedures had been in existence prior to the amendment to the Administrative Procedure Act in 1966 and yet Congress had not seen fit to add as an exemption to the application of Section 554 the Board's jurisdictional dispute proceeding under Section 10(k).

the LMRA. This procedure was followed in the instant case (Main A. 57). It resulted in the completion of the disputed work in December 1970, long before the 10(k) was held in March 1971 (Main A. 9 & 13).

Once the threat of injunctive relief resulted in the completion of the disputed work, the need for expedition was satisfied. Thus, the determination by the Board in its 10(k) hearing, as to which of the two competing unions was entitled to perform the disputed work, was issued long after the disputed work had been completed. Further, the commingling of functions in the same attorney at the Labor Board's Regional Office, was not even alleged to have been an essential element to expedite either the 10(k) hearing or the subsequent unfair labor practice hearing. Therefore, this argument is without merit.

However, from a practical point of view, the Labor Board is easily capable of remedying the commingling of functions violation. ITT, CWA, and the Labor Board all argue in their Brief that rarely has the commingling function taken place. Local 134 submits that this is tacit recognition of the requirement of Section 554 of the APA, and is an argument in favor of Local 134's position rather than the positions advanced in their briefs. More importantly, it shows that the Labor Board will suffer no injury by following the prohibition against commingling of functions. Indeed, the Labor Board could easily issue an internal memorandum to its personnel ordering them to refrain from acting in both capacities, in the few cases where it might happen in the future.

Additionally, the Labor Board found the decision of the Seventh Circuit one which did not warrant its seeking a review by this Court, and therefore it did not file its own Petition for Certiorari. To the contrary, the Labor Board

chose to accept the Seventh Circuit decision and to close the file of the case which gave rise to the proceedings below (App. A.).

When the practical effects of the commingling of functions in the instant case are considered, Local 134 is the only party seriously harmed. Initially it had suffered the harm that results from the deprivation of the legal rights guaranteed in Section 554 of the APA. Further, Local 134 suffered serious detriment to the presentation of its case before the Labor Board in the 10(k) hearing, by having the subpoenas served upon ITT and CWA quashed by the hearing officer. Local 134 was forced to seek special permission to appeal from that hearing officer's ruling in the middle of the 10(k) hearing (Main A. 6 & 7). The Labor Board denied special permission to appeal on the last day of the 10(k) hearing (Main A. 8). Later, in its Decision and Determination of Dispute, the Labor Board affirmed the ruling of the hearing officer (Main A. 10 fn 1).

The Labor Board decided the jurisdictional dispute question without the substantial evidence which Local 134 was seeking by means of these subpoenas. In its determination the Labor Board based its award to CWA in the disputed work, primarily upon the existence of the collective bargaining agreement, concerning which Local 134 was seeking evidence (Main A. 16). The ruling by the hearing officer to quash the subpoenas was of great consequence to the presentation of Local 134's case. Further, this ruling by the hearing officer is a clear example of the conclusion of the Seventh Circuit that the one who hears the case has the power to shape the record upon which the subsequent decision will be made. Later, this same person acted as prosecutor to advocate the unfair labor practice complaint, and the Board's Decision and Deter-

mination of Dispute. It was this conduct which the Seventh Circuit found to violate both the letter and the spirit of the APA.

Finally, ITT, CWA, and the Labor Board have asked this Court to enforce the Labor Board's final order. These requests are inappropriate even if this Court denies enforcement to the decision of the Seventh Circuit.

The ruling by the hearing officer, which resulted in the denial to the Labor Board of the evidence concerning a substantial factor in its jurisdictional award, was the subject of Local 134's issue number 2 in its argument to the Seventh Circuit (Main A. 78). Thus, the decision of the Labor Board in the instant case was argued by Local 134 to be in direct conflict with a decision of the Sixth Circuit Court of Appeals decision in *NLRB* v. *Dayton Motels, Inc.*, 474 F.2d 328. However, the Seventh Circuit did not decide the question of the hearing officer and the Labor Board's refusal to consider the evidence sought to be obtained by Local 134 and introduced in support of its contentions, because it decided the case upon the violation of the APA. Consequently, an important issue raised to the Court of Appeals was not decided. As was argued above at p. 36, this Court has consistently remanded to the Court of Appeals those cases where unresolved issues of substance remain when this Court reverses the decision of the Court of Appeals.

VII.

CONCLUSION

For the reasons set out above, Local 134 requests that the decision of the Court of Appeals for the Seventh Circuit be affirmed by this Court.

However, should the Court disagree with the decision of the Seventh Circuit, the appropriate order of this Court would not be to enforce the Board's order or to remand to the Court of Appeals for enforcement as urged by ITT, CWA, and the Labor Board, because there remain undecided issues raised below by Local 134.

Respectfully submitted,

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APPENDIX A

NATIONAL LABOR RELATIONS BOARD
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Telephone: (312) 353-7597

February 6, 1974

Robert E. Fitzgerald, Jr., Esq.
53 West Jackson Boulevard, Suite 1112
Chicago, Illinois 60604

Re: Local No. 134, International Brotherhood of Electrical Workers
(ITT Communications Equipment and Systems Division)
Case No. 13-CD-209

Dear Sir:

This is to advise you that we have closed our records in the above-entitled case.

Very truly yours,

Ross M. Madden
Regional Director

cc: John D. O'Brien, Esq.
Seyfarth, Shaw, Fairweather & Geraldson
111 West Jackson Boulevard
Chicago, Illinois 60604

Jerome Schur, Esq.
Katz & Friedman
7 South Dearborn Street
Chicago, Illinois 60603

Local Union No. 134, International Brotherhood of Electrical Workers, AFL-CIO
600 West Washington Street, Chicago, Illinois 60606

Communications Workers of America, AFL-CIO
7460 North Sheridan Road, Chicago, Illinois 60626

International Telephone & Telegraph Corp., Communications Equipment and Systems Division
191 Biesterfield Road, Elk Grove Village, Illinois 60007

ITT-Communications Equipment and Systems Division
60 Washington Street, Hartford, Connecticut 06106

APPENDIX B

Administrative Procedure Act 5 USC §701-706

§ 701. Application; definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891-1902, and former section 1641(b) (2), of title 50, appendix; and

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

§ 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency within the meaning of a relevant statute, is entitled to judicial review thereof.

§ 703. Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

§ 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

§705. Relief pending review

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a

case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.